

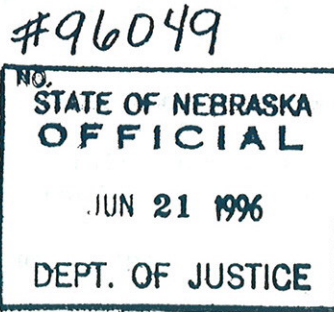


STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL



DATE: June 21, 1996

SUBJECT: Authority of Pardons Board to Deny Applications for
Re-Instatement of Suspended Driver's Licenses

REQUEST BY: Lisa M. Peery, Administrative Assistant
Nebraska Board of Pardons

WRITTEN BY: Don Stenberg, Attorney General
Laurie Smith Camp, Deputy Attorney General

Dear Ms. Peery:

On behalf of the Nebraska Pardons Board, you requested the opinion of this office regarding what action, if any, the Board is required to take when an applicant applies to the Board for a commutation in the form of re-instatement of a suspended driver's license. We conclude that Nebraska's Constitution and its statutes create no due process right to a commutation hearing other than the right to file an application for commutation; that the Board may consider any such applications without the need for a hearing; that the Board's consideration of such applications may be made on reports of such information as the Board may request from its staff; and that the Board may vote to deny the applications as a group, if it chooses to do so.

In *State v. Bainbridge*, 249 Neb. 260 (1996), the Nebraska Supreme Court found that a person who had suffered a revocation of a driver's license as punishment for an offense could not obtain a re-instatement of the driver's license by judicial commutation under Neb. Rev. Stat. § 60-6,209 (1993). The court found that the statute's provision for judicial commutation was unconstitutional

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Dale A. Comer
James A. Elworth
Lynne R. Fritz
Royce N. Harper

Lauren L. Hill
Jay C. Hinsley
Amy Hollenbeck
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Joseph P. Loudon

Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Melson
Ronald D. Moravec
Fredrick F. Neid
Marie C. Pawol
Kenneth W. Payne

Paul N. Potadle
Jonathan Robitaille
Robert B. Rupe
James D. Smith
James H. Spears
Mark D. Starr
Martin Swanson

Timothy J. Texel
John R. Thompson
Barry Waid
Terri M. Weeks
Alfonza Whitaker
Melanie J. Whittamore-Mantzios
Linda L. Willard

Lisa M. Peery
Board of Pardons
June 21, 1996
Page -2-

because it invaded the Pardons Board's constitutional power to commute sentences, and therefore also violated the Nebraska Constitution's separation of powers clause.

Due to the Nebraska Supreme Court's decision in *Bainbridge*, it is anticipated that a large volume of applications will be submitted to the Pardons Board by individuals who seek commutations in the form of restoration of their driver's licenses.

Article IV, § 13, of the Nebraska Constitution provides in part:

The Governor, Attorney General and Secretary of State, sitting as a Board, shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the law of the state except cases of treason and cases of impeachment.

The Nebraska Supreme Court has held that the Pardons Board has "unfettered discretion" to grant or deny an application for clemency, and can do so for any reason or for no reason at all. *Otey v. State*, 240 Neb. 813, 828-30 (1992). The Nebraska Supreme Court has also held that there are no provisions in Nebraska's Constitution or in its statutes that create a liberty interest in commutation hearings, other than the right to file an application for commutation. *Otey*, 240 Neb. at 829.

The federal courts have also recognized that the Nebraska Constitution and its statutes create no right on the part of an applicant for clemency "other than the right to ask for mercy". *Otey v. Stenberg*, 34 F.3d 635, 637 (8th Cir. 1994).

Neb. Rev. Stat. § 83-1,129 (1994) provides:

(1) Any person desiring the Board of Pardons to exercise its pardon authority shall request an application from its secretary. The application shall be returned to the secretary and shall state the specific relief requested and other information as is prescribed by the Board.

(2) The application shall be considered with or without a hearing by the Board at its next regular scheduled meeting. If a hearing is held, it shall be conducted in an informal manner and a record of the proceedings shall be made and preserved according to the guidelines of the Board.

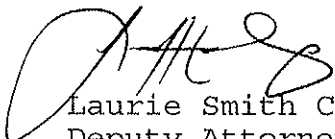
Lisa M. Peery
Board of Pardons
June 21, 1996
Page -3-

Although this section provides that the application "shall be considered . . . by the Board at its next regular scheduled meeting", it does not purport to establish any level of consideration which must be given, nor could the Legislature require the Board to give any particular level of consideration to applications for clemency. Just as the power of pardon is vested absolutely in the President under the United States Constitution, the power is vested absolutely in the Board of Pardons under the Nebraska Constitution. As such, it cannot be modified by the legislative branch. *The Laura*, 114 U.S. 411, 414 (1884); *Schick v. Reed*, 419 U.S. 256, 266 (1974). Where a state constitution fixes the power to pardon, that power is not subject to legislative control except as provided by the constitution itself. The pardoning authority may delegate to anyone the task of examining the facts and reporting to the pardoning authority. Pardon and Parole, 59 Am.Jur.2d § 31-32 (1987).

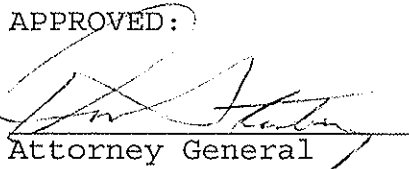
If the Board does not wish to exercise its clemency power for the purpose of restoring driver's licenses to those who forfeited them in criminal proceedings, then the Board may deny applications of that nature as a group at each regularly scheduled meeting of the Board, after considering such information as the Board may request from its staff, and without the need for a review of each individual application.

Sincerely,

DON STENBERG
Attorney General


Laurie Smith Camp
Deputy Attorney General

APPROVED:


Attorney General

